Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	
Establishing Just and Reasonable Rates for	)	
Local Exchange Carriers	)	WC Docket No. 07-135
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Developing an Unified Intercarrier	)	
Compensation Regime	)	CC Docket No. 01-92
	)	
Federal-State Joint Board on Universal	)	
Service	)	CC Docket No. 96-45
	)	
Lifeline and Link-Up	)	WC Docket No. 03-109
	)	
Universal Service Reform – Mobility Fund	)	WT Docket No. 10-208

FNPRM COMMENTS OF GVNW CONSULTING, INC.
ICC ISSUES

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EXECUTIVE SUMMARY

We believe the Commission's effort to date fails to meet the statutory test of providing sufficient and predictable support as is required by the tenets of the Telecommunications Act of 1996, and this plays prominently in the desire of the FCC to reduce access charges for rural carriers.

We encourage the Commission to use at least the remainder of 2012 as a pause point and carefully assess the impacts stemming from its Transformation Order on the ability of carriers serving the highest cost to serve areas fulfilling the statutory mandate of universal service. Early empirical analysis of the financial impacts indicates that the Commission is turning a blind eye to the very real costs of operating in rural areas and the heavy use of rural networks by carriers who make no contribution to the backbone network. We repeat our oft-stated position of the last decade of access reform debate that the transition to bill-and-keep is not an acceptable outcome in light of current federal law and rational economic theory.

The unrecovered embedded costs of investment in the rural carriers' network facilities are real costs that will continue to be borne by the rural carriers. If carriers are not permitted to recover these costs, such actions would ultimately be deemed confiscatory and subject to review under the Takings Clause. Commission rules as found at 47 C.F.R. Section 65.1-65.830 require that a rural rate-of-return carrier be permitted the opportunity to earn an authorized rate of return on investment allocated to interstate access services.

Any ultimate Commission decision that would prevent a rural carrier from a compensatory return would violate the carrier's due process under the law and undermine its legitimate, investment-backed expectations. Such interference with carrier property rights in a manner that undermines such expectations constitutes a taking.

Establishing a zero rate for originating access creates several public policy consequences, as neither the IXC nor the customer has a good reason to limit its use of the local circuit. The negative consequences of such an approach include the creation of new forms of arbitrage, as the IXCs (or the portion of the acquiring company that uses those assets) are able to use the network for free.

With respect to changes in intercarrier compensation rates, rural carriers must receive recovery of the otherwise displaced interconnection revenue from a sustainable access element that should be available only to carriers that experience such plan-imposed rate reductions. To the extent that changes in the existing rules are undertaken, these rule changes must reflect the operational and legal realities that limit the obligations of rural carriers to undertake financial responsibility for the transport of traffic beyond their networks.

The provision of telecommunications in the highest cost to serve areas of the country is inherently risky and capital intensive. In evaluating intercarrier compensation cost recovery issues, the Commission should not attempt to ignore its consistent record evidence that rural costs are different. We believe that the Section 251(a) obligation to interconnect directly or indirectly encompasses an obligation to provide transit services. All small carriers need tandems for interconnection. In many areas, there are no alternative choices for tandem providers, resulting in a potential abuse of market power by the tandem provider. A similar situation is occurring at the present time with respect to middle-mile access to GCI’s Terra Network in Alaska. GCI desires above market prices for stimulus-funded projects. We recommend that the Commission develop rules and regulations related to the provision of transit services under reasonable rates, terms, and conditions.

If the Commission stays on its present course, there will be a need to implement some form of port and link pricing in order to maintain the backbone network that the entire system utilizes.

In order to avoid new forms of arbitrage, we recommend that rural carriers be required to carry traffic to their exchange boundary or existing meet point, consistent with the rural transport rule concept adopted in the Transformation Order. This appropriately provides that rural carriers do not have the financial obligation to deliver their originating traffic to destinations beyond their established network interconnection points.

We respectfully submit that carriers be afforded the flexibility to continue offering service under tariff. Tariffs are an appropriate solution set in situations where it is not feasible for rural carriers to negotiate with numerous service providers who on an individual basis terminate small amounts of traffic.

Proposing to phase-out funds prior to implementation belies a bias that is disruptive to the goal of providing universal service in high-cost to serve territory. Such proposals are premature at best, and confiscatory if implemented. It seems implausible that the Commission has any supporting data or analysis to support such a proposal or action.

We believe that IP-based interconnection between carriers should be governed by the same statutory and regulatory rules as existing network interconnection. We concur that it is appropriate for the Commission to develop a more thorough record on these IP-to-IP interconnection issues before promulgating a set of rules. In the interim, we believe the tenets of Section 251 and 252 obligations provide an appropriate foundational basis.

Introduction and Background

The purpose of these comments is to respond to the Further Notice of Proposed Rulemaking of the Federal Communications Commission released on November 18, 2011. For this comment date, the Commission seeks comment on certain additional issues in Section XVII L-R of the *Further Notice* related to intercarrier compensation issues.

GVNW Consulting, Inc. (GVNW) is a management consulting firm that provides a wide variety of consulting services, including regulatory and advocacy support on issues such as universal service, intercarrier compensation reform, and strategic planning for communications carriers in rural America. We are pleased to have the opportunity to offer comments addressing the issues the Commission has raised in its *Further Notice*, as well as offer comments that relate to the *Transformation Order (Order*) released by the Commission on November 18, 2011.

We encourage the Commission to use 2012 as a pause point and carefully assess the impacts stemming from its Transformation Order on the ability of carriers serving the highest cost to serve areas fulfilling the statutory mandate of universal service. Early empirical analysis of the financial impacts indicates that the Commission is turning a blind eye to the very real costs of operating in rural areas and the heavy use of rural networks by carriers who make no contribution to the backbone network. Federal law requires that reform provide sufficient, predictable and specific support for carriers. In its *Transformation Order*, the Commission instead has focused almost exclusively on managing all change to an artificial national cap as it has been unable to utilize a decade long record to reform the USF contribution mechanism. We believe the Commission's effort to date fails to meet the statutory test of providing sufficient and predictable support as is required by the tenets of the Telecommunications Act of 1996.

M. TRANSITIONING ALL RATE ELEMENTS TO BILL-AND-KEEP

At paragraph 1296 of the *Further Notice*, the Commission requests comment relative to guidance for "*the next steps to comprehensive reform of the intercarrier compensation system.*" As a preface to this section of our comments, we repeat our oft-stated position of the last decade of access reform debate that the transition to bill-and-keep is not an acceptable outcome in light of current federal law and rational economic theory.

Some parties to this proceeding will undoubtedly cite the portion of the Verizon TELRIC case where the Court stated that Congress intended to transition from familiar public utility models "in favor of novel ratesetting" and choose to ignore the completion of the Court's statement that contained the important phrase "short of confiscating the incumbent's property."[1] The Court left open a potential takings challenge against any particular set of rates that did not provide the carrier with a compensable return.[2]

The unrecovered embedded costs of investment in the rural carriers' network facilities are real costs that will continue to be borne by the rural carriers. If carriers are not permitted to recover these costs, such actions would ultimately be deemed confiscatory and subject to review under the Takings Clause. Commission rules as found

[1] Verizon v. FCC, 535 U.S. 467, 489 (2002).
[2] Id. at 524-525.

at 47 C.F.R. Section 65.1-65.830 require that a rural rate-of-return carrier be permitted the opportunity to earn an authorized rate of return on investment allocated to interstate access services.

Established precedent in this regard may be found in Duquesne Light Co. v. Barasch, 488 U.S. 299, 308-10 (1989); and FPC v. Hope Natural Gas Co., 320 U.S. 591,602 (1944). Any changes to access rates that result in revenues that do not recover total costs associated with past investment decisions reviewed by regulators do not comport to the intent of the Telecommunications Act of 1996.

Any ultimate Commission decision that would prevent a rural carrier from a compensatory return would violate the carrier's due process under the law and undermine its legitimate, investment-backed expectations. Such interference with carrier property rights in a manner that undermines such expectations constitutes a taking[3].

Originating Charges remain appropriate given the requirements borne by certain local exchange carriers

At paragraph 1298 of the *Further Notice*, the Commission states that: "*Other than capping interstate originating access rates and bringing dedicated switched access transport to interstate levels, the Order does not fully address the complete transition for originating access charges*."

Under current Commission rules, rural local exchange carriers (RLECs) are required to provide equal access to interexchange carriers,[4] which enable the IXC to establish a retail relationship with the RLEC's subscriber. In addition, RLECs are

[3] Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).
[4] Even after the *Transformation Order*, the equal access requirement remains for rural carriers.

required to perform the call originating functions for services for which they are not the retail service provider such as 8YY service. With these requirements in place, it is reasonable to continue to reflect originating compensation for such calls. To do otherwise would deprive a carrier the ability to recover an appropriate portion of applicable network costs from intercarrier compensation.

Establishing a zero rate for originating access creates several public policy consequences, as neither the IXC nor the customer has a good reason to limit its use of the local circuit. The negative consequences of such an approach include the creation of new forms of arbitrage, as the IXCs (or the portion of the acquiring company that uses those assets) are able to use the network for free. By requiring all users of the network, not just the end-user subscribers to pay for use of the network, resources are allocated efficiently as demand will be driven based on the cost of using the network. This concept is supported by a previous NASUCA statement[5] that any plan for intercarrier compensation reform must recognize that a carrier that "*originates, transits or terminates traffic on the network of another carrier imposes costs on that carrier.* ***As a result, the cost of intercarrier compensation cannot be zero***." (Emphasis added)

With respect to changes in intercarrier compensation rates, rural carriers must receive recovery of the otherwise displaced interconnection revenue from a sustainable access element that should be available only to carriers that experience such plan-imposed rate reductions. To the extent that changes in the existing rules are undertaken, these rule changes must reflect the operational and legal realities that limit the obligations

[5] National Association of State Utility Consumer Advocates (NASUCA) Intercarrier Compensation Proposal, CC Docket No. 01-92, filed December 14, 2004, page 1.

of rural carriers to undertake financial responsibility for the transport of traffic beyond their networks.

What does this mean for a review of the basis of calculating rural carrier intercarrier compensation? The Commission should follow for rural carrier intercarrier compensation the policy differentiation it used in adopting the Rural Task Force rules for universal service. Simply stated, the prescription to keep communications in rural areas viable[6] is to continue the principles that serve as the foundation of the earlier Rural Task Force rules.

This was the conclusion reached by the Rural Task Force at the start of this century. Rural is still different in 2012, and will still be different in future years[7]. The rural difference is a valid consideration in developing intercarrier compensation public policy in 2012[8]. Any reform to intercarrier compensation for rural carriers must reflect the diversity of cost between rural and non-rural carriers, and among the subset of rural carriers[9].

This was demonstrated empirically in the Rural Task Force's White Paper 2[10]. In a rate-of-return regulatory environment, the overarching principle that the Commission should adhere to is that rate-of-return carriers are entitled, as a matter of law, to a full

[6] Rural areas provide benefits to the entire society through the provision of agricultural, energy and recreational resources that are enjoyed by both urban and rural residents.
[7] In the RTF Report, the concept of the Law of Large Numbers was discussed, explaining the phenomena that with a large number of offices, urban carriers are able to flatten out any discrepancies. In an access/ratemaking arena, the corollary of the 3D rule (Drastically Different Denominators) is applicable. With fewer customers in the rate setting equation, the mathematics is different for rural carrier rate setting.
[8] Rural carriers exist because larger carriers chose not to serve the areas that were most costly to serve.
[9] It is worth noting that in the Commission's own NRPM in WC Docket No. 03-173 issued in September, 2003 focused on TELRIC methodology, the Commission itself tentatively concluded that TELRIC rules "should more closely account for the real-world attributes of the routing and topography of an incumbent's network", as well as "should not be based on the totally hypothetical cost of a most-efficient provider."
[10] "The Rural Difference", Rural Task Force White Paper 2, released January 2000.

recovery of their costs in providing interstate services. A proper balance[11] between the sources of intercarrier compensation, end user rates, and support payments must be maintained.

Transport and Termination

At paragraph 1306 of the *Further Notice*, the question is posed as to the appropriate transition for transport functionality charges. We believe that carriers are entitled to full recovery of those costs. It is not appropriate public policy to ignore costs when action has not been taken to set an appropriate national budget for critical infrastructure.

Alfred Kahn's comments from over a decade ago are very appropriate in any current debate on pricing. In a letter to then FCC Chairman Reed Hundt dated January 14, 1997, Dr. Kahn asserted that the relevant costs are the costs that will actually be incurred by a carrier that has a fully functional network:

> *The general economic principle that they cite clearly requires, however, that the correct pricing signals inform consumers of the costs that society will actually incur if they take somewhat more of each good or service. Advocates of the blank slate version . . . typically assume that this is the level to which competition would drive price, if it were effective. They are mistaken. In a world of continuous technological progress, it would be irrational for firms constantly to update their facilities in order completely to incorporate today's lowest-cost technology, as though starting from scratch. Investments made today, totally embodying today's most modern technology, would instantaneously be outdated tomorrow and, in consequence, never earn a return sufficient to justify the investment in the first place.*

[11] First and foremost, Section 254 mandates that universal service support be "specific, predictable, and sufficient." Implementing a quantile regression approach to distributing federal universal service funding renders the achievement of the "predictable" tenet impossible. Similarly, the metric of "sufficiency" may well not be achieved. In order for RLECs to continue to deploy rural infrastructure in the highest-cost areas, **reliable access to support funding and intercarrier compensation** must continue throughout the investment cycle.

The provision of telecommunications in the highest cost to serve areas of the country is inherently risky and capital intensive. In evaluating intercarrier compensation cost recovery issues, the Commission should not attempt to ignore its consistent record evidence of the last decade that rural costs are different.

Tandem transiting

We believe that the Section 251(a) obligation to interconnect directly or indirectly encompasses an obligation to provide transit services. All small carriers need tandems for interconnection. In many areas, there are no alternative choices for tandem providers, resulting in a potential abuse of market power by the tandem provider. As industry consolidation continues, the regulation of tandem services will become more important.

We recommend that the Commission develop rules and regulations related to the provision of transit services[12] under reasonable rates, terms, and conditions. Without the Commission establishing a reasonable set of parameters, rural carriers will be required to pay whatever price a transit provider chooses to extort[13], or perhaps not even be able to obtain the service.

Several of the current providers of these services are currently well compensated for their infrastructure deployment[14] and should be able to accommodate Commission oversight of transit pricing.

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[12] The major current providers include Verizon, AT&T, Sprint Nextel, CenturyLink and Level 3)

[13] **A similar situation is occurring at the present time with respect to middle-mile access to GCI's Terra Network in Alaska. GCI desires above market prices for stimulus-funded projects.**

[14] As noted at footnote 13 of the Rural Association Group USF filing last month, recent annual reports show that the combined earnings of AT&T and Verizon are approximately twice the level of the entire $4.5 Billion USF. This is not a criticism of large corporations making money. It simply points out that those companies have actively made choices to place money in assets that yield sufficient and compensatory returns.

Other Charges

If the Commission stays on its present course, there will be a need to implement some form of port and link pricing in order to maintain the backbone network that the entire system utilizes. As the Commission is well aware, and as was documented in its public hearings during the National Broadband Plan process, rural infrastructure also supports wireless networks and VoIP services, as detailed in a study sponsored by the Foundation for Rural Service. Current wireless, VoIP, and satellite networks require a connection to land line infrastructure to provide full functionality. This network reality is documented in the white paper *Wireless Needs Wires: The Vital Role of Rural Networks in Completing the Call*, published by the Foundation for Rural Service in March, 2006. This paper states in part:

> *Without thoughtful consideration by policymakers of the challenges of providing wireless services in rural America, as well as the dependence of wireless services on wireline networks, portions of the nation are likely to remain underserved . . .Most importantly, one must recognize that without the underlying wireline network, wireless networks could not exist in their current form. In spite of this obvious fact, large wireless carriers and policymakers alike continue to pursue practices and policies that will in fact undermine the critical wireline network. While discussions on how to modify reciprocal compensation, access charges, and universal service continue, attention must be placed on ensuring these mechanisms are capable of maintaining the fiscal health of that wireline network.*

N. BILL-AND-KEEP IMPLEMENTATION

Points of Interconnection and the Network Edge

Unlike the relatively recent issues of access charges and universal service, the network interconnection issues have a history that dates to Mr. Bell's grand invention of 1876. For example, the issues regarding telegraph interconnection posed regulatory challenges early in the 1900's. The difference between issues then and now is driven by the panoply of services that are available over modern transmission facilities and the sheer magnitude of the dollars involved in these types of regulatory decisions.

In order to avoid new forms of arbitrage, we recommend that rural carriers be required to carry traffic to their exchange boundary or existing meet point, consistent with the rural transport rule adopted in the Transformation Order. This comports with Section 51.305 (a)(2), wherein the rules provide the ILECs offer interconnection "at any technically feasible point within the incumbent LEC's network." This appropriately provides that rural carriers do not have the financial obligation to deliver their originating traffic to destinations beyond their established network interconnection points[15].

Role of Tariffs and Interconnection Agreements

The *Further Notice* seeks comment on the role of tariffs during the transition to the end state environment. We respectfully submit that carriers be afforded the flexibility to continue offering service under tariff. Tariffs are an appropriate solution set in situations where it is not feasible for rural carriers to negotiate with numerous service providers who on an individual basis terminate small amounts of traffic.

[15] We concur with the approach that when competitors elect to locate switching investment well outside the local calling area and utilize indirect connections, rural carriers do not inherit the responsibility for transport to these distant points. We strongly disagree with assertions that would impose build out obligations on rural carriers that would facilitate competitor entry. This is the antithesis of competitive neutrality, which is what should be a foundational element for this Commission.

O. REFORM OF END USER CHARGES AND CAF ICC SUPPORT

ARC Phase-out / CAF ICC Support Phase-out

Beginning at paragraph 1326 of the *Further Notice*, the Commission seeks comment on whether the ARC charge and CAF ICC support should be placed on a defined phase-out or eliminated. While such an approach is consistent with the *Transformation Order* underlying rationale of restricting funds for the highest cost to serve areas via exclusions, phase-outs and caps, it is certainly not consistent with prudent public policy.

Proposing to phase-out funds prior to implementation belies a bias that is disruptive to the goal of providing universal service in high-cost to serve territory. Such proposals are premature at best, and confiscatory if implemented. It seems implausible that the Commission has any supporting data or analysis to support such a proposal or action. At a minimum, the Commission should observe the performance of the mechanisms for three years prior to taking any action that would result in phase-out, phase-down, or elimination.

P. IP-to-IP INTERCONNECTION ISSUES

At paragraph 1335, the *Further Notice* tees up the important issue of IP-to-IP interconnection. We believe that IP-based interconnection between carriers should be governed by the same statutory and regulatory rules as existing network interconnection. We believe that it is appropriate for the Commission to develop a more thorough record on these IP-to-IP interconnection issues before promulgating a set of rules. In the interim, we believe the tenets of Section 251 and 252 obligations provide an appropriate foundational basis. In the Telecommunications Act of 1996, Sections 251 and 252 were used to establish the platform for the negotiation and arbitration of interconnection agreements between telecommunications carriers. To review, Sections 251(b) and (c) enumerate the facilities and services subject to interconnection agreements, while Section 252 focuses on the negotiation, arbitration and pricing standards for such agreements. Since section 251 (b) places the same obligations on both incumbent carriers and new competitive entrants, we believe it is suited[16] to handle the evolution to IP-to-IP platforms.

Stated differently, we submit that the earlier tenets of the Rural Alliance provide a staring point. With respect to rural concerns and needs, we support the principles espoused by the Rural Alliance five years ago:

Intercarrier compensation rates should be uniform and cost-based; current interconnection points and rules should be maintained; *the retail service provider (RSP) should pay for the network usage it creates; transiting services should be available at just and reasonable rates and conditions*; r*evenue replacement funds should be based on net revenue losses;* ***and to protect rural customers, there needs to be additional oversight of IP interconnection and infrastructure-based universal service.***

The no-flash cuts pledge requires a delay until 2013 or 2014

Prior pledges from this Commission to avoid flash cuts would seem to indicate that further significant ICC reform should be delayed until 2013 or 2014. As the RAG

[16] The statutory language developed in 1996 would need to be modified to extend beyond the specific references to telecommunications carriers delivering telecommunications services. This reinforces the concept that more time and study is needed for rules are promulgated. It will also be necessary to determine the scope of Title II common carrier responsibility within this new construct. Some parties, and perhaps key members of the Commission, may have differing views as to the appropriate scope of Title II regulation in an IP-to-IP paradigm.

USF comments filed last month notes in footnote 136: "*No firm can 'turn on a dime' and comply with a new regulation, and the Chairman has been appropriately concerned about 'flash cuts' in reform.*"

We further concur with the Rural Association Group (RAG) at page 32 of its FNPRM USF comment filing: The FCC's current[17] approach "*sacrifices RLEC broadband at the altar of imprudent constraints*." Considering the extensive absence of methods, rationale, and impact assessment, it is premature for the Commission to conclude that the remainder of access should transition to zero rates. There is not a reasonable path for the Commission to extend that fundamentally flawed methodology to the remaining access components.

Respectfully submitted,

Via ECFS at 2/24/12

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[17] We respectfully submit that a Connect America Fund mechanism will not be successful unless residents in the highest cost to serve areas have the ability to access reasonably comparable broadband services at a reasonably comparable price.